United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1904.

No. 1440. 291

No. 7 SPECIAL CALENDAR.

LUIGI CORATOLO, APPELLANT,

vs.

UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JUNE 15, 1904.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1904.

No. 1440.

No. 7, SPECIAL CALENDAR.

LUIGI CORATOLO, APPELLANT,

vs.

UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1904.

In the Court of Appeals of the District of Columbia.

LUIGI CORATOLO, Appellant,
vs.
UNITED STATES. } No. 1440.

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a Supreme Court of the District of Columbia.

UNITED STATES
vs.
LUIGI CORATOLO. } No. 24108. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Indictment.*

Filed in open court January 21, 1904. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Criminal Term, January Term, A. D. 1904.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present:

That one Luigi Coratolo, late of the District aforesaid, on the second day of December in the year of our Lord one thousand nine hundred and three, with force and arms at the District aforesaid, in and upon one Rosa Corado, she, the said Rosa Corado in the peace of God and of the said United States then and there being, feloniously did make an assault with the intent her the said Rosa Corado then and there feloniously to kill and other wrongs and injuries to the said Rosa Corado then and there did, to the great damage of the said Rosa Corado; against the form of the statute in such case

made and provided, and against the peace and Government of the said United States.

MORGAN H. BEACH,
Attorney of the United States in and for the District of Columbia.

Endorsed: No. 24108. United States *vs.* Luigi Coratolo. Assault with intent to kill. Witnesses: Rosa Corado, Christina Corado. A true bill. Henry W. Reed, foreman.

2 *Arraignment.*

Supreme Court of the District of Columbia.

FRIDAY, *February* 26, 1901.

The court resumes its session pursuant to adjournment, Mr. Justice Pritchard, presiding.

* * * * * * *

UNITED STATES *vs.* LUIGI CORATOLO. } No 24108. Indicted for Assault with Intent to Kill.

Come as well the attorney of the United States as the defendant in proper person according to his recognizance; and thereupon, the defendant being arraigned upon the indictment, he pleads thereto not guilty and for trial puts himself upon the country and the attorney of the United States doth the like.

Frank Frazzano was sworn as an interpreter in this cause.

* * * * * * *

Trial.

MONDAY, *April* 4, 1904.

The court resumes its session pursuant to adjournment, Mr. Justice Pritchard, presiding.

* * * * * * *

UNITED STATES *vs.* LUIGI CORATOLO. } No. 24108. Indicted for Assault with Intent to Kill.

Come as well the attorney of the United States as the defendant in proper person according to his recognizance and by his
3 attorneys Messrs. T. L. Jeffords and P. H. Marshall; whereupon comes a jury of good and lawful men of the District of Columbia, to wit:

Frank N. Carver	Moses Pach	Herbert C. Emery
James W. McKee	James W. Hummer	Bryan Corridon
Harry A. Robinson	Joseph Phillips	Thomas D. George
Hillery T. Burrows	Frank Springman	F. J. Moore

who, being sworn well and truly to try the issue herein joined, after hearing the evidence in full, arguments of counsel and charge by the court, they retire to considsr of their verdict and the defendant is committed to the custody of the U. S. marshal.

Charles Lombardy was sworn as an interpreter in this cause.

* * * * * * *

Verdict.

TUESDAY, *April* 5, 1904.

The court resumes its session at ten o'clock in the forenoon by proclamation of the marshal pursuant to the rule of court, the Honorable Jeter C. Pritchard, an associate justice of said supreme court presiding.

* * * * * * *

UNITED STATES *vs.* LUIGI CORATOLO. } No. 24108. Indicted for Assault with Intent to Kill.

Come again the parties aforesaid in manner as aforesaid and the jury that retired yesterday to consider of their verdict who, upon their oath say, that the defendant is guilty in manner and
4 form as charged in the indictment; whereupon the defendant is committed to jail to await further action in this cause.

Motion for New Trial.

Filed in open court April 8, 1904.

In the Supreme Court of the District of Columbia, Holding Criminal Term.

THE UNITED STATES *vs.* LUIGI CORATOLO. } Criminal. No. 24108.

Now comes the defendant, Luigi Coratolo, by his attorneys, and moves the court to set aside the verdict in the above entitled case and grant a new trial, for the following reasons, viz:

1. Because the trial court admitted evidence on behalf of the prosecution contrary to law and the rules of evidence.
2. Because the trial court refused, contrary to law and the rules of evidence, to admit proper evidence offered on behalf of the defendant.
3. Because the verdict of the jury was contrary to the evidence.
4. Because the verdict of the jury was contrary to the weight of the evidence.
5. Because the jury rendered their verdict on evidence insufficient in law to warrant a conviction of the defendant.

6. Because of newly discovered evidence on behalf of the
5 defendant, which has just come to his knowledge, and which could not, by the exercise of due diligence by the defendant and his counsel, have been produced at the trial of this cause.

7. Because the assistant district attorney, in the presence and hearing of the jury in this case, and after objection and protest by counsel for defendant, stated that the defendant, at a subsequent time and in another place from the time and place of the assault charged in the indictment, attempted to make an assault with intent to kill upon another person than the prosecuting witness, which statement necessarily prejudiced the jury against this defendant.

P. H. MARSHALL,
TRACY L. JEFFORDS,
Att'ys for Defendant.

To the attorney for the United States in and for the District of Columbia:

Please take notice that we will call up the foregoing motion before the justice holding criminal court No. 1, on Friday, April 15th, 1904, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

P. H. MARSHALL,
TRACY L. JEFFORDS,
Att'ys for Defendant.

Service of foregoing motion and notice acknowledged this — day of April 1904.

C. H. TURNER.

6 *Motion in Arrest of Judgment.*

Filed in open court April 8, 1904.

In the Supreme Court of the District of Columbia, Holding Criminal Term.

THE UNITED STATES
vs.
LUIGI CORATOLO. } Criminal. No. 24108.

Now comes the defendant, Luigi Coratolo, by his attorneys, and moves the court to arrest the judgment in the above entitled case for the following errors apparent on the record:

1. Because the indictment herein does not comply with the requirements of the fifth and sixth amendments to the Constitution of the United States.

2. Because said indictment does not sufficiently charge the offense of which this defendant has been found guilty.

3. Because said indictment does not charge any offense against the laws of the United States, or the District of Columbia.

4. Because said indictment does not charge the defendant with any violation of law.

5. Because the assault charged in said indictment is alleged to have been feloniously made.

6. Because the offense charged in said indictment is alleged therein to be a felony, whereas said offense is only a misdemeanor.

7 7. Because the indictment in this case does not state any facts constituting a criminal offense, but merely recites a conclusion of law.

P. H. MARSHALL,
TRACY L. JEFFORDS,
Att'ys for Defendant.

To the attorney for the United States in and for the District of Columbia:

Please take notice that we will call up the foregoing motion before the justice holding criminal court No. 1, on Friday, April 15th at 10 o'clock, a. m., or as soon thereafter as counsel can be heard.

P. H. MARSHALL,
TRACY L. JEFFORDS,
Att'ys for Defendant.

Service of foregoing motion and notice acknowledged this — day of April, 1904.

C. H. TURNER.

8 *Motions Overruled, Sentence, Appeal, &c.*

Supreme Court of the District of Columbia.

FRIDAY, *April* 29, 1904.

The court resumes its session pursuant to adjournment, Mr. Justice Pritchard, presiding.

* * * * * * *

UNITED STATES *vs.* LUIGI CORATOLO. } No. 24108. Convicted of Assault with Intent to Kill.

Come as well the attorney of the United States as the defendant in proper person in custody of the warden of the United States jail in and for the District of Columbia and by his attorneys Messrs. T. L. Jeffords, Edwin Forrest and P. H. Marshall; whereupon the defendant's motions in arrest of judgment and for a new trial coming on

to be heard, and argued by counsel, it is considered by the court that said motions be and they hereby are overruled; and, thereupon, it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing, except as he has already said; whereupon it is considered by the court that for his said offense the defendant be taken by the warden aforesaid to said jail whence he came, thence to to the penitentiary (as designated by the Attorney General of the United States) there to be imprisoned and kept at labor for the period of seven (7) years to take effect from and including the date of arrival at said penitentiary; whereupon, the defendant by his attorneys notes an appeal to the Court of Appeals of
the District of Columbia, from the judgment of the court in this
9 cause which is granted; and, thereupon, on motion of the defendant by his attorneys, it is by the court ordered, that said defendant be not required to furnish a bond for costs on said appeal, and that the clerk of this court prepare a transcript of the record without cost to the defendant; and, thereupon, the U. S. attorney in open court waives the issuance of a writ of citation; whereupon the defendant by his attorneys moves the court to fix the amount of the bail in this cause, which motion is granted, the said bail is fixed in the sum of $3500; and thereupon, the defendant enters into a recognizance in the sum of thirty-five hundred dollars ($3500) with *Angelo A. Massino and James S. Cotton*, as his sureties approved by the court, if said defendant fail to forthwith surrender himself to the custody of the marshal of this Distsict to be dealt with and proceeded against according to law in case the judgment appealed from shall be affirmed, or the appeal for any cause dismissed, or the judgment be reversed and a new trial ordered, or if the said defendant depart the court without leave.

Order for Transcript.

Filed in open court May 10, 1904.

In the Supreme Court of the District of Columbia.

UNITED STATES
v.
LUIGI CORATOLO. } No. 24108, Crim. Dock.

John R. Young, Esq., clerk sup. ct. D. C.

DEAR SIR: Please prepare the transcript of record in this
10 cause on appeal by defendant to the Court of Appeals of the District of Columbia; such transcript to consist of the following:

1. Indictment.
2. Arraignment and plea.
3. Verdict.
4. Motions for new trial and in arrest of judgment.
5. Overruling of same, sentence and appeal by def't.
6. Order relieving def't from bond and cost of transcript.

EDWIN FORREST,
Att'y for Def't.
P. H. MARSHALL,
TRACY L. JEFFORDS,
Att'ys for Def't.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 10, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 24,108, criminal, United States *vs.* Luigi Coratolo, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of June, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1440. Luigi Coratolo, appellant, *vs.* United States. Court of Appeals, District of Columbia. Filed Jun- 15, 1904. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia

OCTOBER TERM, 1904.

No. 1440.

No. 7, SPECIAL CALENDAR.

LUIGI CORATOLO, APPELLANT,

vs.

UNITED STATES.

BRIEF FOR APPELLANT.

EDWIN FORREST,
T. L. JEFFORDS,
C. Carrington
Attorneys for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13196

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1440.

No. 7, SPECIAL CALENDAR.

LUIGI CORATOLO, APPELLANT,

vs.

UNITED STATES.

BRIEF FOR APPELLANT.

THE CASE.

The defendant was indicted by the grand jury of this District with having feloniously made "an assault with intent her, the said Rosa Corado, then and there feloniously to kill and other wrongs and injuries to the said Rosa Corado then and there did to the great damage of the said Rosa Corado," &c. (R., 1). The defendant pleaded not guilty (R., 2). On trial the jury found him "guilty in

manner and form as charged in the indictment " (R., 3). Thereupon motions for a new trial (R., 3) and in arrest of judgment (R., 4–5) were duly filed, but it is with the latter only that we have to deal on this appeal. The motions were overruled (R., 5); the defendant sentenced " to be imprisoned and kept at labor for a period of seven years " in a penitentiary designated by the Attorney General, and from the judgment of the court an appeal was noted, bail fixed on the appeal in the sum of $3,500 and given (R., 6). The defendant was relieved of furnishing bond for costs and the United States waived issuance of a writ of citation (R., 6).

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the indictment sufficiently charged an offense under the law in force in the District of Columbia.

2. The court erred in holding that the indictment sufficiently stated the necessary and material facts under the law to constitute the offense of assault with intent to kill.

3. The court erred in holding that the conviction of the defendant under the indictment was by due process of law, as required by the 5th amendment of the Constitution of the United States.

4. The court erred in holding that under the indictment the defendant was informed of the nature and cause of the accusation against him, as required by article 6 of the amendments to the Constitution of the United States.

ARGUMENT.

The main and material question, underlying and forming the basis of the several assignments of error, is whether, under the law in force at the time of the finding of the indictment, the mere allegation that the defendant "feloniously did make an assault with the intent her, the said Rosa Corado, then and there feloniously to kill," is sufficient without stating the mode, manner, or means by which the assault with intent was committed. Upon this point counsel are not unmindful of the decision of the court in the case of The United States against Davis, 16 Appeals D. C., 442, but, as we expect to show, the cases are clearly distinguishable. In the Davis case it was held, among other things, as follows:

"Then, as to the second objection taken that the indictment fails to set forth the particular means or instrument used in attempting to perpetrate the crime of killing the party assaulted. This objection we think is equally untenable as the first. The statutory description of the offense is 'assault with intent to kill.' The statute does not require or designate any particular means to be used in order to constitute the offense. The assault with intent to kill must concur but it is not required that in the indictment it must be alleged and set forth with what means or instrument the killing was attempted to be perpetrated—whether with gun, pistol, sword, knife or club. *If the statute had prescribed the means or manner of killing as by poisoning or drowning, then it would be necessary to allege the means to bring the offense within the statute. But that is not the case here.*"

The indictment in the Davis case was found under section 1144 of the Revised Statutes of the United States relating to the District of Columbia and the punishment for the offense prescribed and inflicted under section 1150 of the same. It is submitted, however, that since the decision of said case

the law has been so changed that its scope as to what is sufficient to constitute a valid indictment in this District in cases of assault with intent to kill has been materially modified and narrowed. It will be contended, also, that that decision, with the law as it stood, when the defendant herein is alleged to have done the act in question, really is in favor of the prisoner, and should operate to sustain the motion in arrest.

At the time of the commission of the offense charged in the case at bar, the Code of Laws for the District of Columbia was in force, and by section 803 thereof it is provided as follows:

"SEC. 803. *Assault with intent to kill, and so forth.*—Every person convicted of an assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or willfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years."

There is no other section in the Code that refers to the offense in question. By comparison with section 1150 it will be observed that the method of punishment is changed by the Code (section 803), the former section (1150 R. S. D. C.) prescribing a punishment for the first offense of not less than two nor more than eight years, and for a second offense not less than six nor more than fifteen years.

In addition to the Code prescribing the punishment for the different assaults enumerated in section 803, at the same time it is contended the statute prescribed certain "means or manner of killing as by poisoning," as contemplated by the decision in the Davis case, "by mingling poison with food, drink or medicine with intent to kill." It cannot be seriously questioned, it is submitted, but that "mingling poison with food, drink or medicine" "or wilfully poisoning any well, spring or cistern of water" constitutes an offense of assault with intent to kill.

"The delivery to another of a deleterious drug is an assault.

Com. *vs.* Stratton, 114 Mass., 303; S. C., 19 Am. Rep., 350.

"It was formerly held that if a person put a deleterious drug (as cantharides) into coffee, in order that another may take it, if it be taken, he is guilty of an assault upon the party by whom it is taken. R. *vs.* Button, 8 C. & P., 660."

"Where the defendant gave to a woman a fig containing love-powders' (*i. e.* cantharides), which she ate, in ignorance of the fact, and was injured in health, the court said: 'Although the defendant was ignorant of the qualities of the drug he administered and of the effects to be expected from it, and had been assured and believed that it was not deleterious to health, * * * this, in itself, was unlawful, and he must be held responsible for whatever effect it produced.' Com. *vs.* Stratton, 114 Mass., 303; S. C., 19 Am. Rep., 350.

If the assault with intent to kill was committed in this case by any of the special means prescribed by the Code, it undoubtedly was the duty of the Government in framing the indictment to set forth that the assault with intent to kill was committed by some one of the means specially prescribed. If that be so, would it not be the duty of the United States to so frame the charge in this case that the special manner or means by which the offense was committed should be set forth. There is nothing in the record to indicate that it was not committed by one of the means set forth in the statute, and on the motion in arrest of judgment we cannot, of course, look beyond the record. Is there any presumption either with the Government or the defendant as to the mode or manner of inflicting the assault with the intent, or that it was not committed by and through one of the modes set forth in the Code? Is there anything in the record to rebut the presumption that it was not? Have we any right to assume that it was not? Might it not be assumed, in the absence of anything in the record to the contrary, that it

was committed through and by one of the modes set forth in section 803?

The witnesses for the prosecution were before the grand jury, and the latter body, as well as the District attorney, was fully informed of the manner and the mode by which the assault was committed, and therefore had full and ample opportunity to so frame the charge that the defendant would be put on guard as to the "nature and cause of the accusation." The indictment should therefore have been so constructed as to certainty and precision that there could not have arisen any doubt whatever as to the specific charge upon which the defendant was to stand trial. The prosecutor had been advised of the decision in the Davis case, and by the provisions of section 803 of the Code, that assaults with intent to kill could in this jurisdiction be committed in different ways, and therefore, it is submitted, the legal duty was imposed upon him to so frame the indictment that there could be no objection thereto on the ground of its being indefinite or insufficient in properly setting forth the offense and the means by which it was committed.

One of the crucial tests to be applied to the sufficiency of this or any other indictment is whether or no in the event of a conviction the defendant, if subsequently indicted for the same offense, could plead former jeopardy. Could the defendant if again indicted for assault with intent to kill with no more detailed account of the offense than is set forth in the present instance plead his former conviction in bar?

Does the mere allegation that the defendant committed an assault with intent to kill, without stating the manner, means, or instruments by which such intent was to be carried out, clearly indicate to the defendant or the court that such intent existed? In other words, is it only a matter of proof to show that the defendant had such intent, without informing the defendant and the court in the first instance by the indictment that such intent manifestly existed or was con-

clusively to be inferred from the means used to effect the same?

Can the court, upon the face of this record and indictment, say that the offense alleged is so definitely set forth as to warrant the judgment or sentence of the court?

In vol. 1 of Wharton's Criminal Law, section 190, it is said:

"In indictments for attempts (that is attempt to commit the offense) the laxity permitted in assaults will not be maintained." * * * "But 'attempt' is a term peculiarly indefinite. It has no prescribed legal meaning. It relates from its nature to an unconsummated offense. It covers acts some of which are indictable and some of which are not."

"SEC. 191. Nor do decisions under statutes rule the question at common law."

"SEC. 192. At common law such facts must be set forth as show that the attempt was criminal in itself. Attempts may be merely in conception, or in preparation, with no causal connection between the attempt and any particular crime, in which case, as has been seen, such attempts are not cognizable by the penal law" * * * "on the same reasoning in an indictment for an attempt to commit a crime it is essential to aver that the defendant did some act, which, directed by a particular intent to be averred would have apparently resulted in the ordinary and likely course of things in a particular crime."

"SEC. 641. On an indictment for an assault with intent to murder, the intent is the essence of the offense."

"SEC. 644. It is true that in indictments for attempts it is requisite to set forth the mode of attempt, but an assault (herein differing from an attempt) is *per se* indictable; and hence it is not necessary to go into details as to the mode." "Where the statute speaks of 'dangerous weapons' or in any way points to a particular instrument there the weapon should be specified." * * * "And in any view it is sufficient unless the statute impose special conditions, if the use of a deadly weapon be averred and the intent be specifically stated."

"SEC. 641. And as a general rule, in all cases of as-

saults with intent, the intent forming the gist of the offense must be specifically averred and satisfactorily proved." * * * "There must in such cases be both attempt and intent." (See cases cited in note.)

In such case how can one judge from the face of the paper whether these things, attempt and intent, concur unless it affirmatively appears that the means or instrument used are set forth in the indictment?

In indictments for assaults with intent to kill or with intent to commit rape or where a deadly weapon has been used or serious damage done, there it would be necessary for the bill to contain the proper averments of the intent, the character of the weapon, and extent of injury.

State *vs.* Hooper, 82 N. C., 663.

In this connection we refer to the following decisions of the Supreme Court of the United States on the general question of the sufficiency of indictments and as to the precision and certainty with which the offense alleged must be charged:

"We have no disposition to qualify what has already been frequently decided by this court that where the crime is a statutory one it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. United States *vs.* Cook, 84 U. S., 17 Wall., 168, 174 (21: 538, 639); United States *vs.* Cruikshank, 92 U. S., 542, 558 (23: 588, 593); United States *vs.* Carll, 105 U. S., 611 (26: 1135); United States *vs.* Simmons, 96 U. S., 360 (24: 819); United States *vs.* Hess, 124 U. S., 483 (31: 516); Pettibone *vs.* United States, 148 U. S., 197 (37: 419); Evans *vs.* United States, 153 U. S., 584 (38: 830)."

Ledbetter *vs.* United States, 170 U. S., 606.

"A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified

sanction from this court in *United States vs. Mills*, 32 U. S., 7 Pet., 138 (8: 636), that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States vs. Carll*, 105 U. S., 611 (26: 1135), 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States vs. Cook*, 84 U. S., 17 Wall., 174 (21: 539); *United States vs. Cruikshank*, 92 U.S., 542, 558 (23: 588, 593). 'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' *United States vs. Carll*, 105 U. S., 611 (26: 1135)."

Evans *vs.* United States, 153 U. S., 584.

"The statute upon which the indictment is founded only described the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital."

"In speaking of the necessity of greater particularity of statement, the court said, p. 558 (593): 'It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must de-

scend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is: first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.'"

United States *vs.* Hess, 124 U. S., 483.

See also,

United States *vs.* Cruikshank, 92 U. S., 542.
United States *vs.* Carll, 105 U. S., 611.

The indictment merely states a conclusion of law, alleging that the defendant committed the offense, but does not allege any facts constituting the offense.

The indictment is fatally defective and insufficient also in that it does not allege that "the assault with intent to kill" was "with malice aforethought." This objection is made on the theory that there is practically no distinction to be drawn between an indictment charging a defendant with "an assault with intent to murder" and, as in this case, "assault with intent to kill." Is there any substantial difference between the two charges? If not, then on the authorities cited below it was a fatal omission, and the motion to arrest should be sustained.

That "intent to murder" is an equivalent for "intent to kill" see Pontius *vs.* People, 82 N. Y., 239.

An indictment which charges the accused with "an assault and battery with a deadly weapon with intent to commit manslaughter" cannot be construed to be an indictment for an assault with intent to kill, which is understood and has been held to be an intent to commit murder.

Bradley *vs.* State, 10 S. & M., 618.

The term "assault with intent to kill" implies the unlawful and felonious attempt to take the life of another.

State *vs.* Doty, 5 Oreg., 491.
State *vs.* Lynch, 20 Oreg., 389.

In State *vs.* Fee, 19 Wis., 563, where defendant was charged with an "assault with intent to murder," and the indictment omitted the words "malice aforethought," it was held fatal; and, further, that such words could not be supplied by others whose import might be the same.

See State *vs.* Wilson, 7 Ind., 516.

It is respectfully submitted therefore that, for the reasons assigned in the motion in arrest of judgment and urged in this brief, the judgment on the verdict should be arrested.

EDWIN FORREST,
T. L. JEFFORDS,
C. Carrington,
Attorneys for Appellant.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1440.

No. 7, SPECIAL CALENDAR.

LUIGI CORATOLO, APPELLANT,

vs.

UNITED STATES.

BRIEF ON BEHALF OF THE UNITED STATES.

MORGAN H. BEACH,
United States Attorney for the District of Columbia,
JAMES S. EASBY-SMITH,
Assistant United States Attorney for the District of Columbia,
Attorneys for the Appellee.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1440.

No. 7, SPECIAL CALENDAR.

LUIGI CORATOLO, APPELLANT,

vs.

UNITED STATES.

BRIEF ON BEHALF OF THE UNITED STATES.

The appellant, Luigi Caratolo, was tried in the supreme court of the District of Columbia upon an indictment which avers that he, on December 2, 1903, and at the District of Columbia—

"in and upon one Rosa Corado * * * feloniously did make an assault with the intent her the said Rosa Corado then and there feloniously to kill and other wrongs and injuries to the said Rosa Corado then and there did" (Rec., p. 1).

It appears from the record (pp. 2, 3) that upon arraignment he pleaded not guilty and was tried and convicted; that he made a motion for a new trial (pp. 3–4) and a motion in arrest of judgment (pp. 4–5); that said motions were overruled (pp. 5–6), and he was sentenced to imprisonment for seven years (p. 6); and thereupon took an appeal from the judgment of the court below to this court.

It is assumed that the motion for a new trial was included in the transcript of record by inadvertence, and it is submitted that this court will not consider the motion or the order overruling the same. It is well settled that the granting or refusal of a motion for a new trial is always addressed to the discretion of the court and cannot be reviewed by an appellate court.

Addington *vs.* U. S., 165 U. S., 185.
Smith *vs.* Mississippi, 162 U. S., 592.
Price *vs.* U. S., 14 App. D. C., 391, 401.
West *vs.* U. S., 20 App. D. C., 347, 351.

In the last-cited case this court strongly reiterated its ruling that (syllabus)—

" An order overruling a motion for a new trial in a criminal cause is not appealable."

The case therefore comes up on the appeal from the order of the court below overruling the motion in arrest of judgment.

In this motion the indictment was attacked because (1) it did not sufficiently charge the offense; (2) because it did not charge the defendant with any offense against the laws of the United States or of the District of Columbia or with any

violation of law, and (3) because the indictment alleges that the offense was *feloniously* committed, whereas the offense charged is only a misdemeanor.

The three questions raised are, therefore:

1. Does the indictment sufficiently charge the offense of assault with intent to kill?

2. Does an "assault with intent to kill" constitute an indictable offense under the law of the United States in force in the District of Columbia?

3. Is the indictment bad because it charges that the offense was *feloniously* committed?

I.

THE SUFFICIENCY OF THE INDICTMENT.

Does the indictment sufficiently charge the offense? It is submitted that this question must be answered in the affirmative.

In the case of Davis *vs.* U. S., 16 App. D. C., 442, the same questions were raised that are presented in the case at bar. The indictment in the Davis case was identical in form with the indictment in the case at bar, with the exception of the difference in names and dates. (See Records and Briefs, Court of Appeals D. C., vol. 76, case 964, Davis *vs.* United States, Record, p. 1.)

In the opinion in the Davis case above cited this court said of that indictment (p. 450):

"In this District a settled practice has prevailed ever since the passage of the act of Congress of March 3, 1831 (4 Stat. at L., 448), from which sections 1144 and 1150 of the Rev. Stat., D. C., were principally taken, by which indictments of the same character and form as the present have been uniformly maintained by the courts, without any averment of the means or instruments by which the assault was made to carry into effect the attempt to kill. This is apparent from the cases of United States *v.* Lloyd, 4 Cr. C. C., 472; United States *v.* Herbert, 5 Cr. C. C., 87; United States *v.* Tharp, 5 Cr. C. C., 390, and United States *v.* Angney, 6 Mackey, 66. Whatever might be thought of the form of the indictment, if it were now for the first time to be passed upon, that form has been so long accepted, and so often approved, by the courts of this District, that nothing short of an apparent danger that it might operate to the prejudice of the defendant would justify a disturbance of the settled practice. There is nothing, however, to indicate in the slightest manner that this form of the indictment could operate to the surprise or prejudice of the defendant; and, in fact, the form of the indictment seems to be strictly in accordance with established precedents elsewhere."

1. If it be objected that the indictment should have charged an "assault with intent to commit murder," or an "assault with intent to commit manslaughter," or an "assault with a dangerous weapon," it seems sufficient to answer that the law-making power describes the offense which it denounces and for which it prescribes punishment as "assault with intent to kill," (Code D. C., sec. 803).

It is submitted that the offense is the "assault" coupled with the "intent to kill," as aggravation, and is not to be pleaded from the standpoint of the offense which would have been committed had the thing attempted been accom-

plished. The statute has made no distinction, in this offense, between an attempt to commit murder and an attempt to commit manslaughter, and it is immaterial which crime would have resulted had death ensued, and it is therefore not incumbent upon the prosecutor to make such a distinction in charging the offense. It is submitted that there is nothing in the wording of the indictment which could possibly surprise or operate to the prejudice of the defendant. He is plainly charged with an "assault with intent to kill." He must answer to the charge of assault. If he plead and prove justification for the assault he is innocent of crime. If he be not justified in making the assault he would be, in the event death ensued, guilty at least of manslaughter. In other words, when the indictment charged the accused with criminally assaulting another person with intent to kill that person, it sufficiently advised him of the nature of the offense charged.

2. But it may be objected that the indictment should have charged specific acts and should have set forth the means or instrument used in the attempt to perpetrate the killing of the party assaulted.

This court has held, in Davis *vs.* U. S., above cited at page 449:

"The statute does not require or designate any particular means to be used, in order to constitute the offense. The assault and intent to kill must concur; but it is not required that in the indictment it shall be alleged and set forth with what means or instrument the killing was to be perpetrated."

II.

EXISTENCE OF THE CRIME OF ASSAULT WITH INTENT TO KILL.

Does an "assault with intent to kill" constitute an indictable offense under the laws in force in the District of Columbia?

We submit, without hesitation, that this question must be answered in the affirmative.

Inasmuch as this court has in the case above cited passed upon this question, it seems unnecessary to go into the history of the law punishing the crime in question. It may be proper to say that the indictment under consideration in the case above cited, and there held to be good, was founded upon sections 1144 and 1150 of the Revised Statutes relating to the District of Columbia, and that the indictment in the case at bar was founded on section 803 of the Code of Law for the District of Columbia; but that the latter law is simply a re-enactment of the former.

III.

VALIDITY OF THE INDICTMENT.

Is the indictment bad because it charges that the offense was *feloniously* committed?

We submit that this question must be answered in the negative.

In the case of Davis *vs.* U. S., above cited, this court has so carefully examined the authorities and so clearly decided

the question that it seems unnecessary to discuss it further.

In fact the case at bar is one on all fours with the case of Davis *vs.* U. S., and all the questions now raised were there decided against the appellant.

It is respectfully submitted that the record presents no error and that the judgment of the court below should be affirmed.

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